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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 610

CHARLES W. STRONG, TRADING AS STRONG MANUFACTURING COMPANY, PETITIONER

v.

FRANCIS R. SMITH, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court delivered no opinion. The *per curiam* opinion of the Court of Appeals (R. 42) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered January 10, 1950. (R. 43.) The petition for writ of certiorari was filed February 15, 1950.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Does the complaint state facts sufficient to bring taxpayer within any exception to the prohibition of Section 3653 of the Internal Revenue Code against suits to enjoin collection of federal taxes?

STATUTE INVOLVED

Internal Revenue Code:

> Sec. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.
>
> (a) Tax.—Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.
>
> * * * * *
>
> (26 U.S.C. 1946 ed., Sec. 3653.)

STATEMENT

The complaint (R. 2a-4a) alleges that the taxpayer was engaged in business at Philadelphia, Pennsylvania, under the style of Strong Manufacturing Company; that the taxpayer and his wife, Martha H. Strong, were, during 1944, the year here involved, operating Strong Manufacturing Company as partners; that the Commissioner of Internal Revenue declined to recognize the partnership between the taxpayer and his wife as valid and a revenue agent proposed, as a result of this deter-

mination, a deficiency in income taxes against the taxpayer in the amount of $28,086.48; that at the time this deficiency was proposed it was agreed that the resulting overassessment in favor of the taxpayer's wife would be applied to the resulting deficiency against the taxpayer; that, at the time the deficiency was assessed against the taxpayer, he and his wife were living together as man and wife, but subsequently they separated and were divorced; that the Commissioner refunded to the taxpayer's wife the sum of $20,279.82, the amount of the resulting overassessment; that to require the taxpayer to pay the entire amount of the deficiency against him without crediting the overassessment in favor of his wife, refunded to her, will be taking his property without due process of law and that the action of the Commissioner is oppressive, unreasonable and unconscionable. (Pet. 2-3.)

Upon these allegations, taxpayer prayed for judgment enjoining the Collector from collecting the deficiency assessed against him and ordering the Collector to credit the taxpayer with the amount refunded to his wife. (R. 4a.)

The Collector moved to dismiss (R. 5a) upon the grounds that the complaint failed to state a cause of action and that the District Court was without jurisdiction.

Upon hearing the taxpayer's motion for a preliminary injunction, the District Court (R. 7a-37a) took evidence in support of the allegations of the

complaint and reserved decision as on final hearing (R. 37a) upon the Collector's renewed motion to dismiss (R. 29a). The Court subsequently entered an order *sur* motion to dismiss (R. 38a) that "The motion must be granted under Section 3653 (a) of the Internal Revenue Code." Judgment, accordingly, was entered for the respondent on February 14, 1949 (R. 39a), and the court below affirmed (R. 42).

ARGUMENT

There is no occasion for further review of this case.

Even assuming the truth of the allegations of the complaint, the District Court determined that it had no jurisdiction in the case because of the provisions of Section 3653 of the Internal Revenue Code. The plaintiff does not purport to be within any of the specific exceptions to the section, which relate solely to the time within which the Commissioner may make assessments of deficiencies and commence distraints or proceedings in court to collect them. Otherwise, exception to the statute has been made only in those rare cases where, in addition to the illegality of the tax, exceptional and extraordinary circumstances were thought to exist. *Miller* v. *Nut Margarine Co.,* 284 U. S. 498; *Allen* v. *Regents,* 304 U. S. 439. Apart from the question whether any such exception is warranted in the light of the plain statutory language, com-

plainant, in order to come within such exception, must make out a case of gross and indisputable oppression, without adequate remedy at law. *Concentrate Mfg. Corp.* v. *Higgins,* 90 F. 2d 439 (C.A. 2d), certiorari denied, 302 U. S. 714. This has not been done herein. Taxpayer concedes that he owes the tax. (R. 2a.) He has made no attempt to show that to pay the tax complained of and to file a claim for refund, as provided by law, would not be an adequate remedy.

Furthermore, taxpayer's sole objection to the procedure followed by the Commissioner is that the overassessment in favor of his wife produced by the Commissioner's refusal to give effect for income tax purposes to the alleged partnership between him and his wife should have been applied to the payment of the resulting deficiency against him. But, although he alleges that a revenue agent accepted his offset, taxpayer does not allege that his wife acceded to such an agreement. An affidavit filed by Government counsel states that no such agreement by the wife is in the files of the Bureau of Internal Revenue, although other agreements of taxpayer and his wife were to be found there. Such an affidavit is proper on motion to dismiss. *Farrall* v. *District of Columbia Amateur Ath. Union,* 153 F. 2d 647 (C.A. D.C.). In the circumstances of this case, the Commissioner had no alternative but to refund to taxpayer's wife the taxes improperly collected from her.

At the hearing taxpayer adduced testimony of his accountant and himself tending to support the allegation that an agreement was reached between taxpayer and the revenue agent. (R. 7a-16a, 17a-29a.) But the only evidence taxpayer adduced to show that his wife had signed an agreement was his own self-serving, inconclusive, and self-contradictory statements. (R. 21a, 26a-29a.) The trial court was not bound to accept taxpayer's assertion that his wife had signed an agreement. *Quock Ting* v. *United States,* 140 U. S. 417. It is plain that the District Court could find no evidence of such an agreement. (R. 34a-35a.)

CONCLUSION

The decision below was clearly correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARCH, 1950.

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